

# TRANSCRIPT OF PROCEEDINGS

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

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In the Matter of:

FLORIDA CABLE TELECOMMUNICATIONS  
ASSOCIATION  
V.  
GULF POWER COMPANY

EB Docket No. 04-381

JUL 20 4 03 PM '06

.FCC-0ALJ RCD

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NEAL R. GROSS & CO., INC.  
1323 RHODE ISLAND AVENUE, NW  
WASHINGTON, D.C. 20005  
TELEPHONE (202) 234-4433

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C.

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IN THE MATTER OF:	)	EB Docket No:
	)	04-381
Florida Cable Telecommunica-	)	
tions Association, Inc.;	)	
Comcast Cablevision of Panama	)	
City, Inc.; Mediacom	)	
Southeast, LLC;	)	
and Cox Communications Gulf,	)	
LLC,	)	
	)	
Complainants,	)	
v.	)	VOLUME XII
	)	
Gulf Power Company,	)	
	)	
Respondent.	)	
-----		

Volume 12

Thursday,  
July 6, 2006

The above-entitled matter came on for  
further hearing, pursuant to adjournment, at 9:00  
a.m.

BEFORE:

THE HONORABLE RICHARD L. SIPPEL.  
Chief Administrative Law Judge

**NEAL R. GROSS**  
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WASHINGTON, D.C. 20005

APPEARANCES:On Behalf of the Complainants:

GEOFFREY C. COOK, ESQ.  
JOHN D. SEIVER, ESQ.  
Of: Cole, Raywid & Braverman  
1919 Pennsylvania Avenue, NW  
Suite 200  
Washington, DC 20006  
(202) 659-9750

On Behalf of the Respondents:

J. RUSSELL CAMPBELL, ESQ.  
ERIC B. LANGLEY, ESQ.  
Of: Balch & Bingham, LLP  
1710 Sixth Avenue North  
P.O. Box 306 (35201)  
Birmingham, AL 35203  
(205) 251-8100

RALPH A. PETERSON, ESQ.  
Of: Beggs & Lane, LLP  
P.O. Box 12950  
Pensacola, FL 32591-2950  
(850) 432-2451

On Behalf of the Bureau:

RHONDA LIEN, ESQ.  
Enforcement Bureau  
Federal Communications Commission  
12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

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I N D E XPAGEOral Argument

On behalf of Respondent . . . . . 2030

On behalf of Complainants . . . . . 2069

Rebuttal Argument

On behalf of Respondent . . . . . 2099

On behalf of Complainants . . . . . 2109

Start Time: 9:06 a.m.

End Time: 10:41 a.m.

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1 P-R-O-C-E-E-D-I-N-G-S

2 (9:06 a.m.)

3 CHIEF JUDGE SIPPEL: On the record.

4 I apologize for being a little late  
5 getting in here. I see it's five after nine on the  
6 clock. I was on a long distance phone call, and I  
7 terminated it as abruptly as I could.

8 We have oral argument today. Does anybody  
9 have anything of a preliminary matter that they wish  
10 to raise or bring to my attention?

11 (No response.)

12 CHIEF JUDGE SIPPEL: All right. Are we on  
13 schedule as far as the confidential document and on  
14 schedule as far as the joint exhibits with the  
15 depositions and --

16 MR. SEIVER: Your Honor, if it's all right  
17 with the court, we were going to defer finalizing all  
18 of that until after we had done our reply comments,  
19 our reply findings. That way we know everything has  
20 been cited, and then we were going to come in and  
21 clean it up after that. Would that be suitable?

22 CHIEF JUDGE SIPPEL: All right. That's

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1       suitable, but I want it to be fairly short after that.  
2       I mean, I don't want it to hang, be hanging loose.

3               MR. SEIVER: Two weeks after, within the  
4       two weeks after?

5               CHIEF JUDGE SIPPEL: I think --

6               MR. CAMPBELL: I think that's fine, and we  
7       can actually shoot for the week following, is what we  
8       had discussed prior to coming in, Your Honor.

9               CHIEF JUDGE SIPPEL: Thank you, thank you,  
10       Mr. Campbell. Two weeks will be fine. And as I say,  
11       I just wanted to touch base with you and see that  
12       everything is on course.

13               Anything from the Bureau?

14               MS. LIEN: No.

15               CHIEF JUDGE SIPPEL: Okay. The burden of  
16       proof is with Gulf. So it's going to be Mr. Langley  
17       or Mr. Campbell that will proceed.

18               MR. LANGLEY: Mr. Campbell.

19               MR. CAMPBELL: Your Honor.

20               CHIEF JUDGE SIPPEL: Mr. Campbell.

21               MR. CAMPBELL: As soon as we get our  
22       screen popped up here. It might be helpful if I dim

1 the lights. Is that okay? PowerPoint --

2 CHIEF JUDGE SIPPEL: If you lose me,  
3 that's one of those things.

4 (Laughter.)

5 CHIEF JUDGE SIPPEL: That's fine.

6 Before you start, let me just tell you a  
7 couple of things that I have that are in my mind.  
8 Okay? And I'm going to start with this pertains  
9 primarily that the focus is on Gulf Power, to begin  
10 with.

11 We know what the procedures are. I sent  
12 this out: 25 minutes, and then you've got ten to  
13 rebut if you want to use it, and the Bureau will have  
14 ten minutes to comment at the end of everything if you  
15 care to.

16 Okay. Full capacity. My understanding is  
17 that Gulf's argument is that there need not be a full  
18 capacity proof, and I guess my question is: that  
19 being an issue in the case, as I see it, putting it in  
20 another way, I asked Gulf Power must there be findings  
21 of full capacity in order for Gulf to prevail.

22 I'm not asking you to answer these

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1 questions now, but I want you to know what's on my  
2 mind.

3 The record seems to have repetitious, and  
4 I don't mean to say it in a bad way, but it seems to  
5 have multiple evidence that Gulf Power poles can  
6 always accommodate one more. That's point two.

7 Point three, Gulf Power admitted in an  
8 interrogatory that, quote, crowded is not the same as  
9 full capacity. That's a representation that I picked  
10 up from Complainant's argument someplace. So I  
11 haven't verified that.

12 The next point, replacement cost  
13 methodology. That would be -- and that is the  
14 replacement cost methodology is what Gulf Power is  
15 advocating, and that means that it would be measured  
16 by the cost for the attacher to construct an  
17 independent system of polls.

18 Fair market value is a standard that has  
19 been rejected by Alabama Power, and as a parenthetical  
20 remark, there is no market for pole space, quote,  
21 market.

22 That's it. So somewhere in the course of

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1 your presentation and discussion maybe you can keep  
2 those points in mind.

3 Mr. Campbell.

4 MR. CAMPBELL: Unfortunately, Your Honor -  
5 - can I remove my jacket, by the way?

6 CHIEF JUDGE SIPPEL: Yes, sir.

7 MR. CAMPBELL: I think we're going to  
8 address all of those points in this closing argument,  
9 and if I do not, then I will certainly circle back and  
10 attempt to do that.

11 We must first start, I think, by thanking  
12 the Court for its indulgence, and the staff, because  
13 we've been in this proceeding that is the first of its  
14 kind. I think we've all to some extent been feeling  
15 our way through this and trying to find a way, and I  
16 think we have effectively done that. We're now at the  
17 conclusion.

18 As Mr. Langley referenced in his opening  
19 statement, this has, however, been a tale of two  
20 cases. The parties are on different paths. They have  
21 different interpretations of the 11th Circuit case.

22 Complainants for their part think that the

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1 case is clear as a bell, that it announces a standard  
2 that is clear, should be applied. It's easy.

3 We think the case is clear as mud, and in  
4 order to clear the mud up, we want to reconcile  
5 existing takings jurisprudence with that case and  
6 reconcile it with existing 11th Circuit precedent in  
7 other pole attachment cases, and we think you have to  
8 keep those two things in mind as you look at a  
9 potential application of whatever that case means.

10 As we boil it down, there are really two  
11 issues to be decided as you come out of Alabama Power  
12 v. FCC. The first one is have we satisfied the  
13 condition precedent that that case has interjected  
14 into takings analysis as it applies to pole  
15 attachments.

16 The answer to that question is yes. We  
17 have proven that the pole space is rivalrous, and we  
18 will talk about that.

19 The second question: having satisfied  
20 that condition precedent, what is the appropriate  
21 measure of just compensation? And as Your Honor has  
22 referenced this morning, fair market value is the

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1 typical standard, but we have advocated a proxy for  
2 fair market value, and we will discuss why we have  
3 advocated the proxy.

4 Moving on to the first topic of rivalry,  
5 and this addresses, I think, your first question, Your  
6 Honor, full capacity versus crowding. Earlier in a  
7 discovery response, as I said, we have all been trying  
8 to find our way through the muddy waters. We have all  
9 grappled with is there a distinction between crowding  
10 and full capacity?

11 In an effort to try to reconcile those  
12 terms, we hypothesize that perhaps there could be a  
13 distinction, and perhaps this is what the distinction  
14 means. As the evidence has unfolded, as we've  
15 listened to the experts and as we have further fined  
16 the analysis of Alabama Power v. FCC, what has become  
17 clear is that even if there is a distinction -- and  
18 I'm still not personally clear on that -- it is a  
19 distinction without a difference in this case.

20 Why? It's a distinction without a  
21 difference because the foundation of the case, Alabama  
22 Power v. FCC, is rivalrous property. It is the

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1 concept of rivalry, and the case alternatively defines  
2 that or alludes to conditions on the pole that would  
3 reflect rivalry as crowding or full capacity.

4 And so what we've done is we've kind of  
5 peeled back the onion a little bit and we've taken the  
6 Alabama Power case. We've looked at it and said,  
7 "What was their real concern? These used these two  
8 alternative words, but what was the real concern?"

9 And the real concern is the condition of  
10 rivalry. Now, is Gulf Power the only entity that has  
11 struggled with this definition, that has maybe applied  
12 crowding and full capacity as their distinction? Are  
13 they the same?

14 No. In fact, the evidence has shown that  
15 the experts, the two expert witnesses from the  
16 complainants, their only witnesses in the case,  
17 themselves use the term synonymously only later to  
18 arrive at a distinction because they felt like it was  
19 a higher legal hurdle for Gulf Power.

20 Remember we saw Mr. Haroldson's sources of  
21 crowding memo that he penned, which were the same  
22 sources of crowding that we used, that Osmose used,

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1 the objective criteria to go out and measure NEC  
2 clearances, to look at the same things we looked at.  
3 So Mr. Haroldson had no problem using crowding  
4 synonymously with full capacity.

5 And still in this case, this engineering  
6 expert sat on the stand and said, "I have no opinion  
7 whether there's a distinction between these two  
8 terms."

9 Ms. Kravtin herself in her outline, her  
10 early testimony that she penned herself, questions and  
11 answers, used the phrase "crowding" and "full  
12 capacity" synonymously.

13 So what we say is that is a side show.  
14 What we're looking at is is there a rivalrous  
15 condition on the pole.

16 All right. Now, let's answer that  
17 question. Again, back to the tale of two cases. We  
18 look at the concept of rivalry and we say: is make  
19 ready necessary in order to make room for that  
20 additional attachment? And this, again, touches on  
21 one of your questions. You can always accommodate one  
22 more.

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1 Well, yeah, if you changed the condition  
2 of the pole. Is make ready necessary? And we say if  
3 you have to change the condition of the pole in order  
4 to accommodate that additional attachment either  
5 through rearrangement or through replacing it with a  
6 taller pole, that's rivalry according to the  
7 definitions that we heard in this case, the  
8 definitions we saw in learned treatises, the  
9 definitions that their experts espouse in the case, as  
10 well as the ones we espouse.

11 A pole is a pole for purposes of our  
12 rivalry analysis. You look at the pole in its current  
13 condition. You don't hypothecate about the future  
14 condition of a pole or a different pole, and so that's  
15 our interpretation of what rivalry means in this case,  
16 and this is how we proffer to apply it on a going  
17 forward basis.

18 Complainants, on the other hand, say,  
19 "Well, can you change that pole? Can you rearrange  
20 it? Can you take it out of the ground, throw it away,  
21 put a new, different pole in place and accommodate  
22 another attachment?"

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1                   And if you can, they say the pole you  
2                   threw away was not rivalrous. We don't think that  
3                   makes sense, and in order to support that, they have  
4                   to go to the point of saying and their expert said  
5                   this, that there are two definitions of a pole. A  
6                   pole is not a pole for purposes of a rivalry analysis.  
7                   We don't think that makes sense.

8                   So where did we get our definition of  
9                   rivalry?

10                  Yes, sir.

11                  CHIEF JUDGE SIPPEL: You say you look at  
12                  the pole and the condition that it's in and then  
13                  determine as to whether or not it's rivalrous or non-  
14                  rivalrous. I think I'm paraphrasing you correctly.

15                  Does it make any difference whether or not  
16                  the pole is crowded or at full capacity?

17                  MR. CAMPBELL: We think that they are one  
18                  and the same, and this is where I'm taking you now:  
19                  crowded versus full capacity. And here's where we  
20                  think we can look to the 11th Circuit's cases. We  
21                  think we can look to the experts' testimony in this  
22                  case and show you that where make ready is necessary,

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1 the pole was at full capacity prior to make ready.

2 And, again, we're digging down into the  
3 foundation of the case, its prior precedent, and the  
4 testimony in this case, and that's where you get the  
5 conclusion that make ready is really the linchpin, and  
6 what make ready demonstrates is that you are expanding  
7 the capacity in the pole, and so let's break that  
8 down.

9 If make ready equals expanding capacity,  
10 if you have to expand capacity, it means capacity  
11 wasn't there. If capacity wasn't there, then whether  
12 you call it crowding or whether you use the term "full  
13 capacity," there was nothing left on that pole. So a  
14 crowded or full pole equals a rivalrous condition.

15 And so if make ready is necessary, that  
16 pole is in a rivalrous condition. Now, are these just  
17 Gulf Power's words? Did we just make this up?

18 No. This is what the expert testimony in  
19 this case is. Mr. Haroldson, for his part, says  
20 expanding pole capacity, which he defines in his  
21 testimony as make ready, is exactly what Gulf Power  
22 and all other companies do when they need more pole

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1 space or pole line capacity. So make ready, in Mr.  
2 Haroldson's opinion, is expanding pole capacity.  
3 That's in his direct testimony.

4 Ms. Kravtin, from her economic  
5 perspective, also agrees that make ready is the  
6 linchpin to a rivalry analysis because she says the  
7 principle is exclusion, and when you perform make  
8 ready, routine make ready, what you're doing is  
9 avoiding having to exclude another attachment.

10 She goes on to say that this is the whole  
11 concept underlying a rivalrous analysis, the  
12 opportunity to exclude. So from her perspective, make  
13 ready, again, is the linchpin of a rivalry analysis.  
14 If you don't perform make ready, you're going to have  
15 to exclude, and in her opinion, if you exclude, that  
16 is rivalrous.

17 Now, a note, a footnote here, one thing we  
18 have to clear up because she is just an economist.  
19 She's not an engineer, but applying her economic  
20 definition, she treats make ready as some sort of  
21 perfunctory process that you just wave the paper work  
22 and it happens, and I forget her exact quote, but I

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1 think it's at Paragraph 345 of the Complainant's  
2 proposed findings, if this is the right paragraph.

3 That is not the right paragraph. Three,  
4 fourteen, "productive capacity on poles can be  
5 harnessed generally as fast as the paper work can be  
6 processed and a technician can be called down to  
7 rearrange attachments or a taller pole can be  
8 transferred from the inventory."

9 Well, that's just not true. That's not  
10 how it works in the real world, and the evidence in  
11 this case bears that out. Make ready is not a  
12 perfunctory process. It may be part of the process,  
13 but it is not just a matter of signing some paper work  
14 and getting it done.

15 So Mr. Haroldson agrees that make ready is  
16 the linchpin, and it is equivalent to expanding  
17 capacity. Ms. Kravtin agrees that make ready is  
18 critical to the rivalry analysis, and the 11th Circuit  
19 agrees. If you look to the seminal decision in this  
20 case, Alabama Power v. FCC at Footnote 8, a very  
21 important footnote and sometimes the devil is in the  
22 details; it's down there in the fine print, and it is,

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1 indeed, in this case.

2 There in Footnote 8 they're talking about  
3 the Southern Company v. FCC case, a case that predated  
4 the Alabama Power v. FCC decision, and there they were  
5 looking at an FCC rulemaking that said under mandatory  
6 access, utilities, you've got to go out and perform  
7 make ready to accommodate another attachment. You  
8 have to expand pole capacity. It was called by the  
9 11th Circuit a forced build-out situation.

10 And the 11th Circuit said, "No, you can't  
11 force utilities to do that. Section 224(f)(2) says  
12 they have a right to exclude if there is insufficient  
13 capacity."

14 And here's what they said about it.  
15 Capacity expansion was defined by the FCC to be make  
16 ready, rearranging or changing out existing  
17 facilities, and the 11th Circuit said, "We can't  
18 reconcile that because what the FCC is trying to do is  
19 make you enlarge pole capacity."

20 So we keep coming back to the same  
21 concept, and that is the concept that we seek to apply  
22 in this case. It is defined by the 11th Circuit.

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1     Their expert agree, and it is workable. Where there  
2     is make ready, the capacity on that pole is exhausted.  
3     You are expanding capacity when you perform make  
4     ready. If that is the condition, there is a rivalrous  
5     condition on the pole, and we have met the standard.

6             CHIEF JUDGE SIPPEL: Can I ask you just to  
7     clarify for me? This is for my thinking. You say if  
8     you have that situation where in order to accommodate  
9     anything else you'd have to perform a make ready.  
10    Tell me exactly how does rivalry fit into that? Is it  
11    because there would be some potential user out there  
12    waiting to get on and he can't get on because --

13            MR. CAMPBELL: Well, the definition of  
14    rivalry, let's go back to the foundation. Ms. Kravtin  
15    and the 11th Circuit say the definition of rivalry,  
16    and I may not hit every word correctly, but the  
17    concept is that the use and enjoyment on that pole  
18    space is diminishing the space available for others to  
19    use, that when a cable company attaches on one foot of  
20    space, no other cable company can get in that one foot  
21    of space, not factoring in the constructive occupancy  
22    of the unusable space. We'll deal with that later,

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1 but no one else can get in that one foot of space.

2 And because of the NESC clearance  
3 requirements, once that happens, as soon as they  
4 attach, everything else on the pole is affected, and  
5 so if you go out to a pole and you look at it and you  
6 say, "Can I get another attacher on that pole? Right  
7 now can they come out and just hook up their  
8 facilities to that pole?" and if the answer to that  
9 question is no, that you've got to change that  
10 property, you've got to expand that property, the  
11 capacity on that property, you have to take that pole  
12 out of the ground, throw it away, put in a taller  
13 pole, okay, that's rivalry and it's the very  
14 definition because the consumption of the people who  
15 were previously on the pole won't allow the additional  
16 attacher to come on.

17 That's rivalry, and in our proposed  
18 findings of fact and conclusions of law, we've skinned  
19 the cat several different ways. We've talked about  
20 sort of structural rivalry on the pole because you  
21 have a limited amount of space on any pole. We've  
22 talked about the contractual requirements that we have

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1       where we've already allocated that space, and we've  
2       talked about all of that in our proposed findings.

3               And I won't repeat all of that there, but  
4       it all goes back to that central tenet, and it's  
5       rivalry, and make ready equals rivalry.

6               CHIEF JUDGE SIPPEL: So then how does that  
7       connect then to your theory of the damages? You're  
8       saying that if you have a rivalrous situation, as  
9       you've outlined it; you don't feel that there's any  
10      obligation to do anything to perform a make ready or  
11      to accommodate a make ready in order to put on an  
12      additional attachment; so you're saying is that we've  
13      missed -- am I right? -- you're saying that we have,  
14      therefore, missed a business opportunity that can't be  
15      compensated for by the FCC formula.

16              MR. CAMPBELL: Well, you hit on a central  
17      point that we need to clarify arising out of what the  
18      Complainants have done in this case because, you  
19      know, this is not a damages analysis per se. This  
20      isn't a personal injury case where you have  
21      compensatory and punitive damages and you do a damages  
22      analysis.

1           Once we show a rivalrous condition on the  
2 pole -- and that was the condition precedent that the  
3 Alabama Power court set forth. Okay? -- they said  
4 that is the condition you have to satisfy in order to  
5 be able to get to that next step, and the next step,  
6 once you get there, is a valuation analysis. It's not  
7 a damages analysis.

8           Now, it talks about ways to demonstrate  
9 rivalry through proving that you have a lost  
10 opportunity, through proving that you have this fire  
11 waiting in the wings, and we're going to talk about  
12 that in the context of evaluation, and the lost  
13 opportunity, and there are lost opportunities in this  
14 case. When the pole is full and we're being forced to  
15 accommodate an attachment at a regulated rate that  
16 does not truly reflect the value of that space, the  
17 opportunity that is lost is the opportunity to go out  
18 and rent that space or lease that space to an entity  
19 like we have done before and like others do, at a  
20 market rate not to this entity, not to the cable  
21 company at a different rate -- and that's something  
22 the Complainant seized on and that's something that

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1 was discussed in the Alabama Power v. FCC case -- but  
2 to rent to a third party, a different company, and  
3 there is no market for that and we'll talk about that  
4 in a second, contrary to some conclusions that the  
5 Complainants attempt to propagate in the case.

6 So it's not a damages analysis once you  
7 prove rivalry. You prove rivalry, it's valuation, and  
8 valuation looks at, well, what have you lost. What  
9 have you lost?

10 And what you've lost is the value of that  
11 space, and that's what we look at. It's just like  
12 once you get to rivalry and you read the language of  
13 the Alabama Power v. FCC case, once you reach rivalry,  
14 you have closed the gap that Judge Tjoflat talked  
15 about between a pole and land because he says once you  
16 show rivalry, then you're like land. It's congruous  
17 to land, and in that analysis once you get congruous  
18 to land, that's just like a normal takings case.  
19 What's his words? We would ordinarily be sympathetic  
20 to Alabama Power's position.

21 So once they get back to that land and  
22 they close the gap between a pole and a piece of land

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1 and they closed the gap between a pole and a piece of  
2 land, this is a takings case, and fair market value is  
3 the standard, and that's what the Complainants are  
4 missing in this case. They want to conflate the two  
5 concepts. We can't allow that to happen. That's not  
6 consistent with takings jurisprudence, and I'll talk  
7 about that more.

8 CHIEF JUDGE SIPPEL: Am I wrong that the  
9 11th Circuit said that fair market value doesn't  
10 apply?

11 MR. CAMPBELL: It says it doesn't apply  
12 unless you show rivalry. It normally applies, but it  
13 said we have to look at something else here. Nowhere  
14 in the record did Alabama Power demonstrate that its  
15 pole space was rivalrous. So in order to get past  
16 that, you've got to show rivalry.

17 But if you look at the analysis of that  
18 case and you square it with all of the other takings  
19 jurisprudence, especially where they talk about it  
20 being congruous to land, once you show rivalry, then  
21 you're back in the normal world. You're back in a  
22 regular takings analysis. You're back to a position

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